IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.

WRIT PETITION LD.NO.1988 OF 2004

M/s.Hindustan Wires Limited & Anr. ...Petitioners.
Vs.
Indian Oil Corporation Ltd. ...Respondent.

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Mr. Shyam Diwan i/b.R. U. Singh for the Petitioners.
Mr. Chirag Balsara for the Respondent.

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CORAM : DALVEER BHANDARI,C.J. &
DR.D.Y.CHANDRACHUD, J.

July 27, 2004.

P.C.:

On 10th December 2003, the Respondent floated a tender for the procurement of LPG Cylinders from LPG Bottling Plants in the Northern Region. The First Petitioner participated in the tender and on 16th March 2004, an order was placed on the First Petitioner for the supply of 62,000 LPG Cylinders of a capacity each of 14.2 kgs. On 30th March 2004, the First Petitioner addressed a letter to the Respondent recording that its factory was under a lockout from 7th February 2003 (that is, even prior to the floating of the tender and the award of the contract) and claiming

on that ground, the existence of a Force Majeure situation. On 15th April 2004 and 19th April 2004, the Respondent called upon the First Petitioner to advance the supply schedule and intimated the First Petitioner about an additional allocation. On 11th May 2004, the First Petitioner stated that it was not in a position to execute the purchase order because of a pending labour dispute. Eventually, on 13th May 2004, the Respondent informed the First Petitioner that its earnest money deposit stood forfeited since the First Petitioner had not supplied even a single cylinder against the purchase order. Moreover, the quantities allocated to the First Petitioner were 'pruned' to 62,000 Cylinders.

2. On 21st June 2004, the Respondent has floated another tender. Clause 15 of the special terms and conditions provides that all successful tenderers against the earlier tender dated 10th December 2003 are required to complete the entire supply for which a purchase order has been placed after which a fresh purchase order would be placed under the subsequent tender dated 21st June 2004. The First Petitioner by its letter dated 3rd

July 2004 has sought a waiver of Clause 15. This having not elicited any response from the Respondent, the Petitioners have instituted these proceedings under Article 226 of the Constitution. The reliefs which have been prayed include (i) an appropriate writ, directing the Respondent to waive Condition No.15; (ii) a declaration that non-supply of quantities pursuant to the purchase order in respect of the earlier tender dated 10th December 2003 was on account of Force Majeure Conditions; (iii) an appropriate writ quashing the communication of the Respondent dated 13th May 2004; (iv) an appropriate writ, directing that the Respondent is not entitled to claim damages, or to impose upon the First Petitioner a condition for the supply of goods under the first tender; and ((v) a direction to the effect that the First Petitioner is entitled to the protection of the Force Majeure clause and that the Respondent cannot impose Condition No.15.

3. Having heard Learned Counsel appearing on behalf of the Petitioners and the Respondent, we do not find any reason to interfere in the exercise of our jurisdiction under Article 226 of the

Constitution. The earlier tender was floated by the Respondent on 10th December 2003 and the purchase order was placed on the Petitioners on 16th March 2004. From the First Petitioner's letter dated 30th March 2004 to the Respondent, it is evident that the factory of the First Petitioner was under lockout since 7th February 2003. This was even before the tender was floated on 10th December 2003 and prior to the purchase order dated 16th March 2004. Obviously, therefore, the situation of lockout which was in existence even before the contract was awarded cannot qualify as a Force Majeure Condition within the meaning of Clause 9 of Annexure-II. That provision is to the effect that if at any time during the continuance of the contract, the performance under the contract is prevented or delayed by the reasons stipulated therein for a period of seven days, then the consequence envisaged would follow, namely, that upon notice neither party shall be entitled by reason of such event to terminate the contract or have a claim for damages against the other. In the present case, a condition of lockout which had existed even before the execution of the contract between the parties cannot qualify as a Force Majeure

Condition. In the circumstances, we do not find any reason to fault the Respondent for its letter dated 13th May 2004 informing the First Petitioner that since not even a single cylinder had been supplied against the purchase order, the Respondent was forfeiting the earnest money deposit and pruning the quantities to be supplied under the purchase order. This is a matter which lies purely within the realm of the contractual relationship between the parties and there is no reason to exercise the writ jurisdiction particularly in the absence of any arbitrariness on the part of the Respondent such as would bring the matter within the purview of Article 14 of the Constitution. The validity of the action to forfeit the Earnest Money cannot be tested in these proceedings. This is a matter on which evidence would have to be adduced to resolve a disputed factual issue. The Petitioners are at liberty to adopt the appropriate remedy.

4. The Respondent has stipulated in its new tender dated 21st June 2004 that bidders must complete all supplies under the previous tender after which a fresh purchase order, if any, shall be

placed under the new tender upon successful bidders. This action of the Respondent cannot be regarded as arbitrary or unreasonable. The Respondent is entitled to insist that purchase orders which have been placed on bidders under the earlier tender must be fullfiled before fresh purchase orders are issued. There is nothing unfair and unreasonableness in this decision.

5. In the circumstances, the reliefs which have been sought in these proceedings are manifestly untenable. There is no merit in the petition which is accordingly rejected.

CHIEF JUSTICE

DR.D.Y.CHANDRACHUD, J.